

AMERICAN ARBITRATION ASSOCIATION
230 SOUTH BROAD STREET, 12TH FLOOR
PHILADELPHIA, PA 19102-4106

Case Nos. 14 20 1400 0390

In the Matter of Arbitration Between

CITY OF PHILADELPHIA

Employer

and

FRATERNAL ORDER OF
POLICE, LODGE NO. 5

Union

OPINION
AND
AWARD

ARBITRATOR:

Robert E. Light, mutually chosen
by the parties pursuant to the
rules and regulations of the
American Arbitration Association

HEARINGS:

October 30, 2014 and November 12, 2014
in Philadelphia, PA. Subsequent to the oral
hearing, both counsel filed post-hearing briefs
and supplementary material

APPEARANCES:

For the City
Diane A. Lobell, Esq.
Gregory Malkowski, Captain

For the FOP
Marc Gelman, Esq. (Jennings Sigmond, P.C.)
Joseph Harvey, Grievant
John R. McGrody, Union Vice President

ISSUES:

Was there just cause for the discharge of Joseph
Harvey? If not, what shall be the remedy?

BACKGROUND

Hearings in this matter were held in the Philadelphia, Pennsylvania offices of the American Arbitration Association on October 30, 2014 and November 12, 2014, with both sides present and duly represented by counsel and where both parties were afforded full and complete opportunity to offer evidence and argument in support of their respective contentions. A stenographic record of the proceedings was taken and thereafter both counsel filed post-hearing briefs, after which time the hearing was declared closed.

The City of Philadelphia (hereinafter the "City" or the "Employer") and Fraternal Order of Police, Lodge No. 5 (hereinafter the "Union" or "FOP") are signatories to a current collective bargaining agreement. A grievance was filed by the FOP dated April 21, 2010 alleging that Police Officer Joseph Harvey had been discharged without just cause. (Joint Exhibit No. 3). The matter was not resolved during the course of the grievance procedure so that it was submitted to arbitration on March 20, 2014 under the auspices of the American Arbitration Association, from whose panel of arbitrators the undersigned was duly chosen.

FACTS

Joseph Harvey, the grievant herein, was hired by the City as a police recruit on April 14, 2003. He was terminated for violation of the Police Department's Disciplinary Code Section 1.75, Conduct Unbecoming a Police Officer as a result of an incident that occurred on October 8, 2009. Specifically, the charges read as follows:

In that Thursday, 10/08/09, approximately 11:00 PM, while in a plainclothes capacity, you and Officers C [REDACTED] M [REDACTED] and H [REDACTED] S [REDACTED] entered the property at [REDACTED]. While at this location and acting in your official capacity as a police officer, you were alone in a second floor bedroom with the female complainant, a 21 year old, when you told her take off her clothing so that you could check whether she had drugs on her person. You then masturbated, depositing semen on the complainant's jeans which had been lying on the floor.

An independent investigation concluded that you, while acting in an official capacity, unlawfully restrained the complainant, exposed your penis in front of her and ejaculated on her clothing. The investigation determined just cause exists to conclude that you have violated the Police Department's policies and/or disciplinary code. You have indicated that you have little or no regard for your responsibility as a member of the Philadelphia Police Department. Therefore, you will be dismissed after being placed on a thirty day suspension.

(Exhibit D to the Affidavit of Police Commissioner Charles Ramsey, Joint Exhibit J-2)

It should be noted that the arbitration matter took over four years to come before this arbitrator since Officer Harvey was also arrested on criminal charges arising from the incident in question and that prosecution of those charges took a number of years to complete. It was stipulated by the parties that the outcome of the cases preceding the arbitration hearing would have no bearing on the FOP's grievance or upon the disposition of this case by this arbitrator and that the arbitrator should make an independent analysis which, as is his duty, to determine whether or not the City had met its burden of proof in dismissing Mr. Harvey from its employ.

Initially, it was acknowledged by both counsel that, although a number of witnesses testified at the hearing, the case really comes down to the testimony of the two principal witnesses namely the grievant and a woman by the name of M [REDACTED] C [REDACTED] who is an acknowledged drug addict. These were the only two people who were present in the second floor bedroom of an abandoned house on October 8, 2009, the date of the incident.

While there were a number of witnesses that testified, as counsel acknowledged and with which comment the arbitrator agrees, the case, in reality, begins and ends with credibility findings that is as between Ms. C [REDACTED] and Mr. Harvey.

FACTS

On October 8, 2009, Officer Harvey was in a bedroom with Ms. C [REDACTED] in what is known as a "drug house." As Ms. C [REDACTED] testified at the hearing, she was high at the time they were alone together in the bedroom; her jeans were off and Officer Harvey masturbated in front of her with some ejaculate ending up on her jeans that were on the floor. Both the grievant and Ms. C [REDACTED] testified that Officer Harvey never touched her but that he gave her a few dollars before he left her alone in the bedroom. At the time of the incident, the Officer had identified himself as a police officer to Ms. C [REDACTED] and that the amount that he gave to her was \$6.00 for cigarettes which he threw on the bed. Beyond those essential facts, much of what transpired has been disputed so that at the core of this matter are credibility findings which the arbitrator will have to make and which will be addressed hereinafter.

Initially, Officer Harvey testified that the sexual encounter with Ms. C [REDACTED] took place while he was off-duty before the start of his shift. Further, it appears that there was agreement that the Officer and Ms. C [REDACTED] were alone in the bedroom for some period of time. There is also some dispute with respect to when the incident occurred but police logs establish that the event took place in the 10:00 p.m. – 10:30 p.m. time frame. At the hearing both Ms. C [REDACTED] and Officer Harvey testified in much detail.

Much of the testimony of the prime witnesses namely Mr. Harvey and Ms. C [REDACTED] was inconsistent. However, testimony with respect to material facts was consistent as regards to what occurred as related by Ms. C [REDACTED]. Quite clearly, as she testified, the event occurred and it happened during the night time raid and that she did not consent to it. More likely than not the incident occurred in the evening hours rather than in the afternoon as claimed by the grievant who stated that he was "off-duty."

POSTION OF THE CITY

The City takes the position that there was just cause to dismiss Police Officer Joseph Harvey and that his conduct on the day in question should not be excused. It cites a recent decision between these parties by another arbitrator who, when confronted with a dismissal of a police officer who admitted to engaging in on-duty sexual relations with a woman who's vehicle he had stopped in a traffic stop, upheld his termination. As that arbitrator noted, "He had no right to engage in sexual activity while on-duty under any circumstances." In this case, as the City argues, Mr. Harvey's admitted conduct was inexcusable, whether it occurred while he was technically "off-duty" or while he was engaging in pre-shift police activity as he claims. (City Brief pg. 16). It asks that the grievance be denied and that the discharge be sustained.

POSITION OF THE FOP

The FOP, on the other hand, takes the position that there was not just cause for the termination of Officer Harvey and requests that the grievance be sustained; that Officer Harvey be reinstated to his position as a police officer with full seniority and benefits; that he be made fully and completely whole for all his losses, and that his record be fully expunged of any reference to this discipline. (FOP Brief pg. 25). The FOP argues that "this case begins and ends with C [REDACTED]'s credibility." (FOP Brief pg. 4). While it acknowledges that testimony of fellow police officers was offered, there were only two people in the room when the events that directly resulted in the termination of the grievant occurred and that the grievant should be believed as opposed to Ms. C [REDACTED].

Counsel for the Union attempted to distinguish the testimony offered during the various proceedings namely the January 20, 2011 criminal proceeding, testimony offered during the May 5, 2011 criminal proceeding, testimony offered during the December 15, 2011 criminal

proceeding as well as testimony offered during the course of this arbitration hearing. Argued was that the testimony of Ms. C [REDACTED] was inconsistent and “changing” and that she should not be believed. On the contrary, the FOP argues that the testimony of the grievant as well as the testimony of the officers, while admittedly not present in the room when the incident occurred, nevertheless should be believed and that the testimony of the City’s witnesses cannot be reconciled. (FOP Brief pgs. 14-25). Quite clearly, it points out that the arbitrator must determine what happened in the abandoned house on [REDACTED] on the day in question. It asks the arbitrator to find that the grievant’s version of the events that transpired is the more credible and that, therefore, discharge was inappropriate and that the grievant should be reinstated to his prior position with full back pay and, in all other respects, be made whole.

DISCUSSION

The arbitrator has carefully weighed all of the evidence in the case including the testimony of the witnesses during these two days of hearing, the arguments of respective counsel, as made both at the hearing and in their post-hearing briefs, the contract, the exhibits which included transcripts not only of the two days of arbitration hearings but of the proceedings in Municipal Court of Philadelphia on January 20, 2011, May 5, 2011, December 15, 2011 as well as the proceedings before the Federal Grand Jury on March 19, 2013. All of these documents were submitted in evidence at the arbitration hearings. As noted at the outset, what this case really comes down to is the arbitrator’s assessment of credibility as between Mr. Harvey and Ms. C [REDACTED]. Both counsel acknowledged this fact and noted that this case begins and ends with credibility determinations.

As this arbitrator has said on numerous occasions, assessing credibility is no easy task for arbitrators to perform and where, as here, most of the testimony is in such direct conflict so that task becomes all the more difficult. However, of necessity, credibility findings have had to be made so that the arbitrator utilized those kinds of tests in order to ascertain credibility namely, the demeanor of the witnesses as they testified, the reasonableness of the stories that were told, the existence of conflicts with other assertions of fact, and the simple plausibility of the grievant's story when weighed against ordinary experience and common sense. In evaluating a witnesses credibility, arbitrators normally look at the following factors: the interest or lack of interest in the outcome of the case; the relationship to the party; the ability and opportunity to know, remember, and relay the facts; the manner and appearance; the age and experience; frankness or sincerity or lack thereof; the reasonableness or unreasonableness of the testimony in light of all of the other evidence in the case; any impeachment of the testimony and finally any other factors that bear on believability and weight. This arbitrator has endeavored to ascertain who was or was not telling the truth here by utilizing those factors which have been enumerated above.

As has been noted above, Ms. C [REDACTED] was (and perhaps still is) an admitted drug addict. Having said that, however, this arbitrator was impressed and honestly somewhat surprised by the forthright and straightforward manner in which she testified at the hearing. To be perfectly blunt and frank, the arbitrator found her to be a credible witness in this matter. On the contrary, the same could not be said for Officer Harvey. Simply put, this arbitrator believes that Ms. C [REDACTED]'s version of what transpired in the second floor bedroom of the abandoned house in question on October 8, 2009 is believable. The arbitrator finds that the grievant engaged in the sexual act in question, leaving undisputed DNA evidence of the act on her jeans and that these

events occurred while the grievant was acting in his official capacity as a police officer. Quite clearly, there was a nexus between his conduct and the grievant's job as a police officer in the City of Philadelphia. In that regard, the arbitrator agrees with City counsel that "whether he was technically "on-duty" or "off-duty" at the time the incident occurred is of little significance in the context of this proceeding. Further, the arbitrator agrees with Commissioner Ramsey who took this action as a "Commissioner's Direct Action" that he decided to dismiss Joseph Harvey because of the very serious allegations of improper/criminal conduct committed while Harvey was on duty and acting in his role as a police officer, which were sustained by the IAD investigation. (Joint Exhibit No. 2). In sum, this arbitrator agrees that the City of Philadelphia had just and proper cause to terminate Police Officer Joseph Harvey and this arbitrator will not disturb the City's action in that regard.

Therefore, the undersigned having duly heard all of the proofs and allegations of the parties to this proceeding makes the following award:

AWARD

There was just cause for the discharge of Joseph Harvey. Grievance denied.

A handwritten signature in dark ink, consisting of a large, stylized 'R' followed by a cursive 'L' and a horizontal line extending to the right.

ROBERT E. LIGHT, ARBITRATOR

AFFIRMATION

I, Robert E. Light, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.

Dated: October 30, 2015

A handwritten signature in dark ink, consisting of a large, stylized 'R' followed by a cursive 'L' and a horizontal line extending to the right.

Robert E. Light, Arbitrator